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APPENDIX

Supreme Court, U. S.
FILED
FEB. 22
APR 30 1974

Supreme Court of the United States

MICHAEL RODAK, JR., CLERK

October Term, 1973

No. 73-786

**MAJOR FRED R. ROSS and
STATE OF NORTH CAROLINA,**

Petitioners

v.

CLAUDE FRANKLIN MOFFITT,

Respondent

**MAJOR FRED R. ROSS and
STATE OF NORTH CAROLINA,**

Petitioners

v.

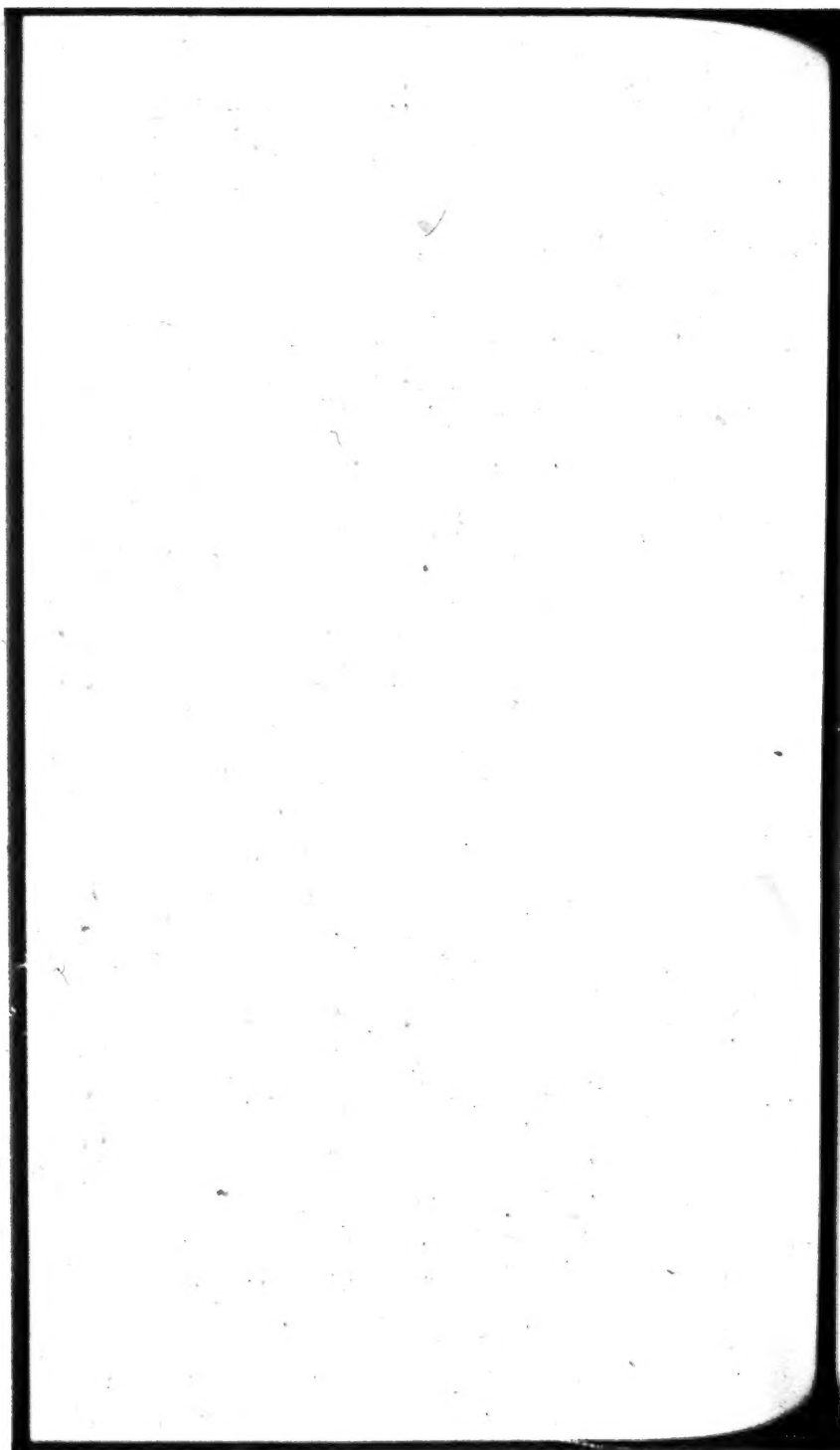
CLAUDE F. MOFFITT,

Respondent

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE FOURTH CIRCUIT**

**PETITION FOR WRIT OF CERTIORARI FILED
NOVEMBER 13, 1973.**

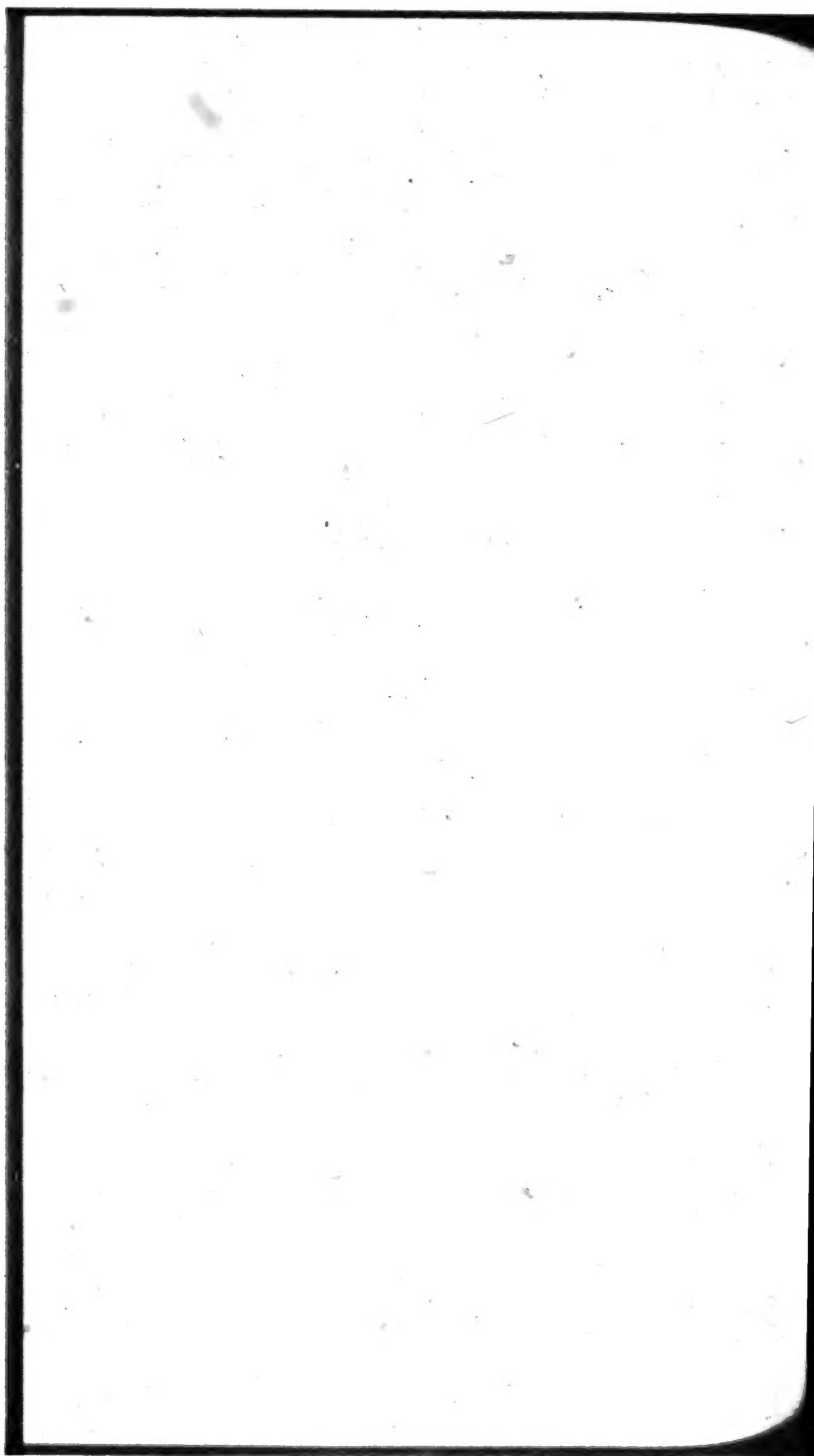
CERTIORARI GRANTED JANUARY 7, 1974



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Respondent

RELEVANT DOCKET ENTRIES

I.

No. 72-2480

(Mecklenburg County Conviction)

May 11, 1970 Schedule "B" Criminal Session of the Mecklenburg County Superior Court—Claude Franklin Moffitt, while represented by William D. McNaull, Jr., Esquire, court-appointed counsel, was convicted of forgery and uttering a forged instrument.

November 18, 1970—Opinion of the North Carolina Court of Appeals filed upon Moffitt's appeal, while represented by court-appointed counsel, William D. McNaull, Jr., Esquire,

from the Mecklenburg County Superior Court. *STATE v. MOFFITT*, 9 N.C. App. 694, 177 S.E. 2d 234 (1970).

December 7, 1970—Moffitt is advised in a letter from his counsel, William D. McNaull, Jr., that he had "approached" the Superior Court for appointment to appeal "from the North Carolina Court of Appeals to the Supreme Court of North Carolina."

December 11, 1970—Moffitt filed an extensive Petition for Post Conviction Review pursuant to N.C.G.S. 15-217, et seq., *Review of Criminal Trials*, in the Mecklenburg County Superior Court contending that the indictment upon which he was tried was invalid.

December 17, 1970—Order filed by the Honorable Frank W. Snepp, Resident Judge of the 26th Judicial District, denying post conviction relief.

February 9, 1971—"Petition for Appointment of Counsel" filed in the United States District Court for the Western District of North Carolina — Charlotte Division, was denied.

February 26, 1971—Moffitt filed an Application for Writ of Habeas Corpus. *MOFFITT v. ROSS*, Civil No. 2842—Charlotte (W.D.N.C.)

September 17, 1971—The Petition for Writ of Habeas Corpus was dismissed.

October 4, 1971—Moffitt gave notice of appeal to the Court of Appeals for the Fourth Circuit.

November 26, 1971—Order filed in the Mecklenburg County Superior Court denying Moffitt's second post conviction petition in which he alleged that his constitutional rights were violated because the North Carolina Court of Appeals,

in accordance with its rules, heard and decided his case upon a narrative of the testimony at the trial instead of the trial transcript itself.

April 17, 1972—The appeal to the Fourth Circuit is dismissed by stipulation so that Moffitt could exhaust State Court remedies.

April 25, 1972—Moffitt filed his third Petition for post conviction review in which he alleged that his statutory and constitutional rights were violated in that the trial court refused to appoint counsel to seek a Petition for Writ of Certiorari on his behalf from the Supreme Court of North Carolina after the North Carolina Court of Appeals had affirmed his conviction.

April 28, 1972—Order filed by the Honorable Frank W. Snepp, Resident Judge of the 26th Judicial District of the State of North Carolina, dismissing Moffitt's third post conviction petition.

May 2, 1972—Order filed by the Honorable Frank W. Snepp, Resident Judge of the 26th Judicial District of North Carolina, appointing Hugh B. Campbell, Jr., Esquire, as court-appointed counsel to represent Moffitt upon Petition for Writ of Certiorari to the North Carolina Court of Appeals.

June 26, 1972—Petition for Writ of Certiorari filed on Moffitt's behalf by Hugh B. Campbell, Jr., Esquire, court-appointed counsel, in the North Carolina Court of Appeals. **MOFFITT v. STATE, No. 72SC215PC.**

July 18, 1972—Petition for Writ of Certiorari denied by the North Carolina Court of Appeals.

August 25, 1972—Application for Writ of Habeas Corpus filed in the United States District Court for the Western District

of North Carolina — Charlotte Division, **MOFFITT v. ROSS**, No. C-C-72-193 (W.D.N.C.).

November 29, 1972—Order filed by James B. McMillan, United States District Judge, denying habeas corpus relief on all but one claim.

December 6, 1972—Moffitt gave notice of appeal to the Court of Appeals for the Fourth Circuit.

January 18, 1973—Certificate of Probable Cause entered by John D. Butzner, Jr., Judge of the United States Court of Appeals for the Fourth Circuit.

II.

No. 72-1720

(Guilford County Conviction)

October 30, 1970 Session of the Guilford County Superior Court—Claude Franklin Moffitt while represented by R. D. Douglas, III, Esquire, Public Defender, was convicted in the Guilford County Superior Court.

May 26, 1971—Opinion filed by the North Carolina Court of Appeals in Moffitt's appeal in which he was represented by the Honorable R. D. Douglas, III, Esquire, Public Defender. **STATE v. MOFFITT**, 11 N. C. App. 337, 181 S.E. 2d 184 (1971).

September 7, 1971—Petition for Writ of Certiorari to the North Carolina Court of Appeals dismissed by the Supreme Court of North Carolina "for lack of a substantial constitutional question." **STATE v. MOFFITT**, 279 N.C. 396, 183 S.E. 2d 247 (1971).

December 10, 1971—Moffitt filed a paperwriting dated December 8, 1971 in the Guilford County Superior Court, which

he entitled "Motion for Employment of Counsel" "to seek an appeal in the federal courts."

December 14, 1971—Honorable Charles T. Kivett, Resident Judge of the Guilford County Superior Court, advised Moffitt by letter that "this Court does not have jurisdiction to appoint you an attorney to represent you in a further hearing in the federal court. I would advise you to contact the Middle District Court here in Greensboro and ask appointment of counsel through that Court."

January 25, 1972—Moffitt filed a Petition for post conviction review in the Guilford County Superior Court alleging a denial of counsel to perfect an appeal to the Supreme Court of the United States.

February 25, 1972—the Petition for Post Conviction Review was denied by Order filed by the Honorable James G. Exum, Jr., Judge of the Guilford County Superior Court.

March 10, 1972—Petition for Writ of Certiorari filed in the North Carolina Court of Appeals contending that refusal of the Court to appoint counsel denied him "access to the Court of Appeals for the United States."

March 27, 1972—the Petition for Writ of Certiorari was denied in Conference by Order of the North Carolina Court of Appeals.

April 11, 1972—Application for Writ of Habeas Corpus filed in the United States District Court for the Middle District of North Carolina — Greensboro Division. **MOFFITT v. ROSS**, No. C-101-G-72 (M.D.N.C.).

May 19, 1972—Memorandum Opinion and Order filed by the Honorable Eugene A. Gordon, Chief United States District Judge for the Middle District of North Carolina, dismissing the Application for Writ of Habeas Corpus.

January 18, 1973—Certificate of Probable Cause entered by John D. Butzner, Jr., Judge of the United States District Court of Appeals for the Fourth Circuit.

III.

CONSOLIDATED PROCEEDINGS

February 6, 1973—Motion to Consolidate No. 72-1720 and 72-2480 filed in the Fourth Circuit Court of Appeals.

February 8, 1973—Motion to Consolidate No. 72-1720 and No. 72-2480 granted.

May 8, 1973—Oral arguments heard in the United States Court of Appeals for the Fourth Circuit.

August 29, 1973—Opinion of the United States Court of Appeals for the Fourth Circuit filed in the consolidated cases of MOFFITT v. ROSS and NORTH CAROLINA, 483 F. 2d 650 (4th Cir. 1973).

September 7, 1973—Notice of Appeal filed by Major Fred R. Ross and the State of North Carolina.

September 11, 1973—Order entered by the United States Court of Appeals for the Fourth Circuit staying the mandate in the consolidated cases of MOFFITT v. ROSS and NORTH CAROLINA.

November 15, 1973—Petition for Writ of Certiorari filed in the Supreme Court of the United States by Major Fred R. Ross and the State of North Carolina in the consolidated cases of ROSS and NORTH CAROLINA v. MOFFITT, No. 73-786, October Term, 1973.

January 7, 1974—Petition for Writ of Certiorari granted in the consolidated cases of ROSS and NORTH CAROLINA v. MOFFITT, No. 73-786, October Term, 1973.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

CLAUDE FRANKLIN MOFFITT,)	
)	
Petitioner)	
)	
v.)	C-101-G-72
)	
MAJOR FRED R. ROSS and)	
STATE OF NORTH CAROLINA,)	
)	
Respondents)	

MEMORANDUM OPINION AND ORDER

GORDON, Chief Judge

On April 11, 1972, Claude Franklin Moffitt, a state court prisoner, was allowed to file an application for writ of habeas corpus in the Court without the prepayment of fees. 28 U.S.C. § 1915.

The petitioner alleges that his constitutional rights were violated in that:

1. The State of North Carolina has refused to appoint counsel for the purpose of a review of his conviction by the federal courts.

2. He has been denied a trial transcript.

Pursuant to an order to show cause, the respondents filed an answer to the petition and a motion to dismiss. After a consideration of the records before the Court, it is concluded that the petitioner's constitutional rights have not been vio-

lated. Therefore, the relief sought will be denied and the action dismissed.

In state proceedings, the appointment of counsel rests solely in province of the state courts. *Joyner v. Clifton*, No. 71-1619 (4th Cir., April 10, 1972). In federal courts, the appointment of an attorney to represent an indigent is a privilege and not a right, discretionary with the district court. *Bowman v. White*, 388 F. 2d 756 (4th Cir. 1968), *cert. denied*, 393 U.S. 891 (1968).

The petitioner shows no particularized need for a transcript and, therefore, is not entitled to one. *Justice v. Coiner*, No. 15,066 (4th Cir., April 28, 1972).

ORDER

For the reasons set forth above, IT IS ORDERED that the petition of Claude Franklin Moffitt, filed April 11, 1972, be, and the same is hereby denied and dismissed.

In accordance with this Court's liberal policy relative to the filing of actions in forma pauperis, 28 U.S.C. § 1915, and in accordance with the intent of Rule 24, Federal Rules of Appellate Procedure, if the petitioner desires to do so, permission to appeal in forma pauperis is hereby granted. However, because of the many baseless claims this petitioner has submitted to this Court over the years, if an appeal is effected, IT IS ORDERED that all of his files be forwarded pursuant to the Rule cited herein.

IT IS FURTHER ORDERED that the Clerk of this Court mail a certified copy of this Memorandum Opinion and Order to the petitioner at his place of confinement and two certified copies to the Attorney General of the State of North Carolina.

Eugene A. Gordon
United States District Judge

May 19, 1972

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

Charlotte Division
C-C-72-193

CLAUDE F. MOFFITT, Petitioner,)

-vs-)

MAJOR FRED R. ROSS and)
STATE OF NORTH CAROLINA,)

Respondents.)

ORDER

Petitioner, Claude Franklin Moffitt, is presently detained at the North Carolina prison unit in Statesville serving consecutive sentences of eight (8) to ten (10) years for forgery and eight (8) to ten (10) years for uttering a forged check imposed on May 20, 1970, in Mecklenburg County Superior Court by Judge T. D. Bryson upon petitioner's conviction by a jury. Moffitt appealed his conviction to the North Carolina Court of Appeals, which found "(no) error." *State v. Moffitt*, 9 N.C. App. 694, 177 S.E. 2d 324 (1970). He then sought habeas corpus relief in this court by petition filed on February 17, 1971. In an order filed September 17, 1971, the petition was dismissed and all claims were denied. On October 4, 1971, Moffitt gave notice of appeal to the Court of Appeals for the Fourth Circuit.

Subsequently, in a letter dated November 15, 1971, Moffitt, in essence, asked this court to reconsider its ruling on one of the allegations treated in the order of September 17, 1971. On April 20, 1972, it was ordered by the court, treating petitioner's letter as a motion to reconsider judgment and to grant a certificate of probable cause, that the the motion be denied.

Meanwhile, by stipulation of counsel filed with the Fourth

Circuit Clerk of Court April 19, 1972, the case on appeal to the Fourth Circuit was dismissed without prejudice, apparently in order for Moffitt to utilize or exhaust state remedies on one of the issues raised. Accordingly, he filed for post-conviction relief in Mecklenburg County Superior Court, which relief was denied by Judge Frank W. Snapp in an order dated April 28, 1972. Appointed counsel for Moffitt petitioned for writ of certiorari from the North Carolina Court of Appeals on June 26, 1972, for review of Judge Snapp's order. The petition was denied by order of the court in conference dated July 17, 1972.

Moffitt again seeks a writ of habeas corpus from this court, alleging the following as grounds for relief:

(1) That he was denied the effective assistance of counsel for trial and appeal;

(2) That he was subjected to an unconstitutional penalty for pleading not guilty in that he was told if he would plead guilty he would receive a far lesser sentence;

(3) That his punishment was excessive because his pre-trial time was not credited to the sentence;

(4) That he was denied a fair trial;

(5) That the trial court was without jurisdiction by reason of "defective and multiplied" bills of indictment; and

(6) That the state failed to appoint him counsel to file a petition for certiorari in the North Carolina Supreme Court.

The first three grounds are new to this court; the last three appeared, in one fashion or another, in Moffitt's previous petition.

ALLEGATION ONE: In support of the allegation of in-

effective counsel, Moffitt merely states that his attorney misled him in his appeal rights. This issue has not been developed in any of the state court proceedings in Moffitt's case. State remedies must be exhausted before this court can consider the issue of ineffective counsel. 28 U.S.C. § 2254 (b) (1971). See, e.g., *Duffield v. Peyton*, 352 F.2d 802 (4th Cir. 1965).

ALLEGATION TWO: Moffitt pleads no facts in support of his claim that he was told that if he would plead guilty he would receive a far lesser sentence. However, in the state court post-conviction proceedings it was determined, and alleged on appeal by Moffitt's appointed counsel, that Moffitt's trial attorney was the only person who might have so advised him. In essence, Moffitt hints at an offered plea bargain. The plea bargain has been approved by the Supreme Court and the Fourth Circuit, with appropriate safeguards. *Santobello v. New York*, 404 U.S. 257 (1971); *Walters v. Harris*, 460 F.2d 988 (4th Cir. 1972). It is axiomatic that when the offered bargain is refused, defendant runs the risk of receiving a harsher sentence than the one proposed in the plea bargain. Moreover, it does not appear that Moffitt's individual right to a jury trial was penalized or "chilled" by any proposed bargain, since Moffitt did indeed plead not guilty and receive the benefits of trial by jury. Admittedly, due process forbids vindictiveness on the part of the state against a defendant who seeks a trial that comports with the Constitution. See *North Carolina v. Pearce*, 395 U.S. 711 (1969); *Colten v. Kentucky*, 407 U.S. 104 (1972). Yet petitioner's vague allegations do not point towards vindictiveness on the part of the state. Instead they point to the realistic appraisal of the situation by Moffitt's trial lawyer—that if the defendant pleaded guilty and thus facilitated the task of the prosecutor, he might benefit from a recommendation of a more lenient sentence. This is the very essence of the plea bargain.

ALLEGATION THREE: As with his first allegation, Moffitt has not presented to the state courts his request for credit

against his sentence of his pre-trial jail time. However, this court does not require the exhaustion of state remedies with respect to a claim for pre-trial custody, since the possibility of relief in the state courts on this grounds is foreclosed. See *State v. Virgil*, 276 N.C. 217, 172 S.E. 2d 28 (1970) and *Perry v. Blackledge*, 453 F. 2d 856 (4th Cir. 1971). [North Carolina General Statutes § 15-176.2, allowing credit for pre-trial custody, did not become effective until July 19, 1971, and is not retroactive.]

In its supplemental answer to this petition the state admits that Moffitt spent fully six months (November 19, 1969 to May 20, 1970) in jail awaiting trial. This court has repeatedly held that confinement without credit for time spent in jail before trial unable to make bail violates the equal protection clause of the Fourteenth Amendment. *E.g.*, *Steele v. North Carolina*, No. C-C-72-37 (W.D. N.C. 1972).

Unless the state can affirmatively show that credit for pre-trial custody was given or that pre-trial incarceration was considered by the trial judge in sentencing, it appears that Moffitt's request for credit should be granted.

ALLEGATION FOUR: Moffitt alleges that he was denied a fair trial. In the immediate petition he alleges no supporting facts. His previous petition alleged erroneous admission of prejudicial testimony and improper jury instructions. In general, defects in trial procedure are cognizable in federal habeas corpus only when they impugn the fundamental fairness of criminal proceedings. *Grundler v. North Carolina*, 283 F.2d 798 (4th Cir. 1960). As before, Moffitt has failed to meet the burden of demonstrating fundamental unfairness.

ALLEGATION FIVE: Again Moffitt alleges multiple and defective indictments as grounds for relief. After thorough consideration this court previously determined his complaints to be devoid of constitutional merit. Nothing has changed.

ALLEGATION SIX: Moffitt asserts a statutory and constitutional right to counsel for the filing of a petition for certiorari in the North Carolina Supreme Court. In its orders of September 17, 1971, and April 20, 1972, this court held essentially that both statutory and constitutional law grant the right to counsel only on direct as opposed to discretionary review and that since the writ of certiorari in the North Carolina Supreme Court is a form of discretionary review, the right to counsel does not accrue.

Although the right of the indigent to counsel throughout the entire criminal process is still developing, see, *e.g.* *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (especially the remarks of Chief Justice Burger in concurrence), this court at this time chooses to stand by its earlier orders and to continue to hold that the constitutional right to counsel does not accrue at the stage of the North Carolina criminal process in which application for writ of certiorari in the North Carolina Supreme Court is made, after a full and fair trial and a complete review for error by the North Carolina Court of Appeals.

When this court's earlier orders were appealed to the Court of Appeals for the Fourth Circuit both counsel for the state and the appointed counsel for Moffitt realized that this court's orders might have been premature, since Moffitt had not exhausted state remedies on the point of right to counsel. They therefore entered into a stipulation of dismissal without prejudice in order for Moffitt to seek redress in the state courts. A key phrase in the stipulation is now alleged by Moffitt to be dispositive of the very issue that had been on appeal.

The phrase was cited as controlling the outcome of the case when it was taken back into the North Carolina courts system for post-conviction relief. The same lawyer that signed the stipulation on behalf of the state at the Fourth Circuit level asserted before the North Carolina Court of Appeals that the

term in question "was intended only to illustrate that the State of North Carolina, by legislation, had adopted an omnibus statutory scheme providing for the appointment of counsel in enumerated instances deemed to be critical stages of criminal prosecution and was never intended to be a concession of the ultimate issue which was to be the subject of subsequent judicial review to be commenced in the courts of the State of North Carolina." This court is compelled to agree with this interpretation, despite the ill-phrased language of the term, simply because the actions of the state are perfectly consistent with such intent and because it is most difficult to believe that the state's advocate (known by this court to be capable) would concede the ultimate issue when, thrice or more, courts had ruled in his favor on the same point.

Accordingly, IT IS ORDERED, that within twenty (20) days after the filing of this order the state affirmatively show whether credit was given for petitioner's pre-trial custody by the trial judge or that such custody was considered by the trial judge in sentencing. If no such evidence exists the state is directed to credit the petitioner's sentence with time spent in custody pending trial (November 19, 1969, to May 20, 1970).

Otherwise, IT IS ORDERED, that all claims for relief be, and they are hereby denied.

The petitioner is advised that he may appeal *in forma pauperis* from this *final order* by forwarding a written notice of appeal to the Clerk of the United States District Court, Post Office Box 1266, Charlotte, North Carolina 28201. Said *written notice of appeal* must be *received* by the Clerk within thirty (30) days from the date of this order and may be filed without the prepayment of costs or giving of security therefor. The court declines to issue a certificate of probable cause.

The Clerk is directed to transmit by mail copies of this order

to the petitioner; to the Attorney General of North Carolina; and to the superintendent or officer in charge of the institution at which the petitioner is presently confined.

This 28 day of November, 1972.

James B. McMillan
United States District Judge